

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,) Case No. 4:23CR3019
)
Plaintiff,)
)
vs.)
)
ANTHONY UNOCIC,)
) Lincoln, Nebraska
Defendant.) September 27, 2023

VOLUME III
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN M. GERRARD
SENIOR UNITED STATES DISTRICT JUDGE

A-P-P-E-A-R-A-N-C-E-S

FOR THE PLAINTIFF: Mr. Daniel D. Packard
Ms. Danielle Fliam
U.S. Attorney's Office
100 Centennial Mall North
Suite 487
Lincoln, NE 68508-3865

FOR THE DEFENDANT: Mr. Korey L. Reiman
Federal Public Defender's Office
100 Centennial Mall North
112 Federal Building
Lincoln, NE 68508

COURT REPORTER: Ms. Lisa Grimminger, RDR, CRR, CRC
100 Centennial Mall North
Room 587
Lincoln, NE 68508
(402) 437-1908

Proceedings recorded by mechanical stenography, transcript
produced with computer.

1 (At 9:30 a.m. on September 27, 2023; with counsel for the
2 parties and the defendant present; WITHOUT the jury:)

3 THE COURT: Good morning, everyone. This is day
4 three of trial, United States of America versus Anthony Unocic,
5 Case Number 4:23CR3019. All counsel are present. Mr. Unocic
6 is present.

7 Counsel, do you need any more time with Mr. Unocic before
8 we have the formal instruction conference?

9 MR. REIMAN: (Shakes head.)

10 THE COURT: All right. Comes now time for the formal
11 jury instruction conference. The Court did provide the
12 proposed jury instructions to counsel after close yesterday
13 afternoon. We had an informal jury instruction conference this
14 morning at 8:30 a.m. A few changes were discussed and made,
15 and now it comes time for the formal instruction conference.

16 Counsel, are you ready to proceed?

17 MS. FLIAM: Yes, Your Honor.

18 MR. REIMAN: Yes.

19 THE COURT: All right. We'll take these -- we'll go
20 through the jury instructions and the verdict form one page at
21 a time.

22 So we are on Instruction Number 1: Introduction. Is there
23 any objection to Instruction Number 1?

24 MS. FLIAM: None from the government.

25 MR. REIMAN: No, sir.

1 THE COURT: Instruction Number 2: Duty of Jury. Any
2 objection?

3 MS. FLIAM: No.

4 MR. REIMAN: No, sir.

5 THE COURT: Instruction Number 3: Evidence.

6 MS. FLIAM: No objection.

7 THE COURT: Is there any objection?

8 MR. REIMAN: No, sir.

9 THE COURT: Instruction Number 4: Exhibits. Any
10 objection?

11 MS. FLIAM: No.

12 MR. REIMAN: No, sir.

13 THE COURT: Instruction Number 5: Credibility of
14 Witnesses. Any objection?

15 MS. FLIAM: No.

16 MR. REIMAN: No, sir.

17 THE COURT: Instruction Number 6: Credibility of
18 Cooperating Witness. Is there any objection?

19 MS. FLIAM: No.

20 MR. REIMAN: No, sir.

21 THE COURT: Instruction Number 7: Statements by
22 Defendant. Any objection?

23 MS. FLIAM: No.

24 MR. REIMAN: No, sir.

25 THE COURT: Instruction Number 8, which is the

1 statement of the indictment; the presumption of innocence;
2 burden of proof. Is there any objection?

3 MS. FLIAM: No.

4 MR. REIMAN: No, sir.

5 THE COURT: Instruction Number 9. These are the
6 elements of the charge, threatening to assault a federal law
7 enforcement officer. Is there any objection?

8 MS. FLIAM: No.

9 MR. REIMAN: Yes, sir.

10 THE COURT: All right. There are objections from the
11 defense, and I'll hear those objections now.

12 MR. REIMAN: Your Honor, prior to trial I did file in
13 filing 36, my proposed jury instructions. One of the proposals
14 I had was directly related to the elements of this case. I
15 proposed specifically with element two that the defendant
16 consciously disregarded a substantial risk that his
17 communication would be viewed by Agent Tubbs as threatening
18 violence.

19 As the Court's aware, *Counterman* changed things, and that
20 is a recent case that came out this summer from the Supreme
21 Court. The Court is relying on cases from the Eighth Circuit,
22 which I certainly understand, but that predated *Counterman*, and
23 I think *Counterman* changed things that when you look at the
24 definition of "reckless" -- well, the definition that is being
25 used is inconsistent with what the Court was trying to do in

1 *Counterman*. It's my position that Mr. Unocic, when he said
2 those statements, had to have that reckless disregard as
3 directed -- it would cause fear in the actual target, Agent
4 Tubbs, not someone who just happened to be around.

5 So I will object based upon filing 36 that it should read
6 that the defendant consciously disregarded a substantial risk
7 that his communication would be viewed by Agent Tubbs as
8 threatening violence.

9 THE COURT: All right. And the Court will consider
10 that as an offer of an alternative instruction.

11 Okay. And I'll hear from the government.

12 MS. FLIAM: Your Honor, we would ask you to overrule
13 or, I guess, rest on this Instruction Number 9 as it's drafted.
14 The Court relied on two Eighth Circuit cases, *Wynn* and *Ivers*,
15 both which involve this same statute and both which involved
16 threats not made directly to the, quote, unquote, victim.
17 There is nothing in the statute itself that requires it to be
18 communicated to the victim.

19 And *Counterman* did change the intent element of it, but
20 *Counterman* itself talks about, "In the threats context,"
21 reckless "means that a speaker is aware 'that others...'" and
22 does not again specifically require communication to the
23 victim.

24 So for those reasons we believe that Instruction Number 9
25 as written is correct.

1 THE COURT: All right. Very well. Well, the Court
2 will overrule the objection, and Instruction Number 9 will
3 stand as is. This is going to take a little explaining on the
4 record so that the Eighth Circuit knows exactly what the Court
5 is doing, what the Court was considering.

6 As I've instructed in Number 9, there are four elements to
7 the crime, and I'm describing those elements in plain English,
8 hopefully.

9 The first element, number one, the defendant has to make a
10 true threat to assault Agent Tubbs. In other words, this
11 cannot be words that are blowing smoke or blowing off steam but
12 a true threat. And what *Counterman vs. Colorado* -- that was a
13 2023 case by the United States Supreme Court -- changed was the
14 subjective intent of the speaker, of the defendant in this
15 case. In other words, the defendant must have a subjective
16 understanding of the statement's threatening nature, and the
17 First Amendment requires no more than demanding a showing of
18 recklessness, and that's why I have instructed as I have in
19 element number two.

20 Element number two states that "Mr. Unocic either knew or
21 intended that others would regard his communication as
22 threatening violence, or recklessly disregarded a substantial
23 risk that others could regard his statement as threatening
24 violence." So there is the subjective element that *Counterman*
25 has placed in and I placed into the instructions. The jury

1 must find that the defendant had a subjective intent.

2 But the U.S. Supreme Court went on in *Counterman* to state,
3 "A person acts recklessly...when he 'consciously disregards a
4 substantial [and unjustifiable] risk that the conduct will
5 cause harm to another,'" and that's meaning, in quotes, "a
6 speaker is aware 'that others could regard his statements as'
7 threatening violence and 'delivers them anyway.'" The "others"
8 means the recipient of the statement. It does not mean the
9 object, or Agent Tubbs as the case would be.

10 So there is a subjective test as to the speaker of the
11 words. It's an objective test as to the listener, the receiver
12 of the words or the communication, and that's exactly how the
13 Court has instructed in this case.

14 As to element number three, at the time of the threat,
15 Tubbs was a law enforcement officer, and I've instructed on
16 that. I don't think there's any serious dispute in this case
17 on that.

18 And instruction *[sic]* number four, "Mr. Unocic made the
19 threat with the intent to retaliate against Agent Tubbs on
20 account of the performance of his official duties." And the
21 issue in this case, as it was in *Wynn*, as it was in *Ivers*, is
22 what is the mens rea that's required? The defendant argues --
23 and the defendant was citing *United States vs. Fenton* -- that
24 the intent to retaliate can exist only when the speaker intends
25 that his threat be communicated to the special agent, to its

1 object, but that's not how I read the plain language of the
2 statute itself. And more importantly, the Eighth Circuit has
3 spoken on this subject in both *United States vs. Wynn* and
4 *United States vs. Ivers*, and *Counterman* didn't change that.

5 So let's take a look at the statute itself, and I'm
6 reading from the statute. "Whoever...threatens to assault...a
7 Federal law enforcement officer." Okay. And there's two
8 different ways that those threats can occur. One would be with
9 the intent to impede, intimidate, or interfere with such law
10 enforcement officer while engaged in the performance of his
11 official duties, and that can call for an element that the
12 agent would have to know of the threat because it's impeding,
13 it's intimidating, or it's interfering with those duties.

14 Then the statute goes on in the disjunctive, "or with
15 intent to retaliate against such...law enforcement officer on
16 account of the performance of official duties." And the Eighth
17 Circuit held very clearly, both in *Wynn* and then reaffirmed it
18 in *Ivers*, that we read into the statute only that mens rea
19 which is necessary to separate wrongful conduct from otherwise
20 innocent conduct.

21 And in *Wynn* the district court instructed the jury it must
22 find that Wynn made a threat to assault or murder an employee
23 with the intent to retaliate against such employee on account
24 of the performance of official duties, and Judge Loken wrote
25 that intent separated Wynn's wrongful conduct from innocent

1 conduct and that is the definition that is to be given, and
2 that was reaffirmed in *Ivers*, and *Ivers* went on to talk about
3 giving further definition to what a true threat was.

4 In *Ivers*, that was the case in which Judge Wright, a
5 district federal judge up in Minnesota, was threatened with
6 death, and actually the threat was made -- Ivers made the
7 threat to his two lawyers. He was mad at Judge Wright on a
8 civil case, the dismissal of a summary judgment, and his rage
9 grew and continued to grow, and he didn't actually make a
10 threat until the latter part of his statements with the
11 lawyers, at which time he finally -- I mean, he was going on to
12 rant about the judge and everything the judge had done wrong,
13 and he concluded his statements by saying, "I was going to
14 throw some chairs, and you don't know the 50 different ways I
15 plan to kill her."

16 That was the only time he ever made a statement to his
17 lawyers at that point in time. The judge didn't know anything
18 about it. And his lawyers at that point in time said, "We've
19 got a problem," and went on to report it. That's exactly what
20 occurred in *Wynn*. The statements weren't made directly to the
21 person or the object, but the call receivers said, "We've got
22 an issue here. This is a real threat. We need to report it to
23 someone." That's exactly what the facts are in this particular
24 case.

25 So the object of the threats does not need to know, and

1 the reasoning from the Circuit -- and I also relied on the
2 Modern Federal Jury Instructions -- makes sense. Because the
3 first part of the statute, if the defendant threatens to
4 assault either an official or law enforcement officer with the
5 intent to impede, intimidate, or interfere with their duties,
6 that calls for a change in behavior. They're trying to stop
7 them. They're trying to change behavior.

8 The second part, "with intent to retaliate against such
9 official...or law enforcement officer," that is the mens rea
10 itself. And you can retaliate in different ways. I mean, you
11 can call them, you can write them -- in this case we're talking
12 about chirping them or whatever the case may be -- or you can
13 simply intend to do the harm, you know. It produces what I
14 would call a *Tarasoff* reaction. I mean, at some point somebody
15 threatens to do harm or to kill an individual, and the
16 recipient, the objective recipient of those threats says, "We
17 got to do something," okay, and the call is made. And in this
18 case the call was made to -- Rivera made a call to his lawyer.

19 And the bottom line is if you threaten to assault or to
20 murder a law enforcement official with the intent to retaliate
21 against that official on account of the performance of his
22 official duties, that is sufficient mens rea in a case such as
23 that. So that's why I have instructed as to element one.

24 Element two is the subjective basis that Mr. Unocic has to
25 have and what the jury must find. The jury is going to have to

1 find that.

2 Three, at the time Mr. Unocic made the threat, Tubbs was a
3 federal law enforcement officer.

4 And four, Unocic made the threat with the intent to
5 retaliate against Agent Tubbs on account of the performance of
6 his official duties. The government's going to have to prove
7 that. I went on to define what "recklessly disregards" means,
8 what "to retaliate" means.

9 So those are -- the elements in Instruction Number 9 will
10 stand.

11 I'll say a couple words about Instruction Number 10
12 because it kind of goes on, it ties into Instruction Number 9.
13 In Instruction Number 10 I go on to define what a true threat
14 is, and that's based directly from the language of *United*
15 *States vs. Ivers*, from the 2020 case from the Eighth Circuit.
16 And I want to be clear that the defendant is going to be able
17 to argue -- I set forth the factors from *Ivers*. When making
18 this determination you may consider, among other things: the
19 reaction of those who heard the threat; whether the threat was
20 conditional; whether the person who made the alleged threat
21 communicated it directly to the object of the threat.

22 In other words, was it communicated to the agent? In this
23 case it wasn't, and I'm going to let the defense argue that all
24 day long, in other words, that it's one of the factors as to
25 whether this is a true threat.

1 Whether the speaker had a history of making threats
2 against the person purportedly threatened. Again, both sides
3 can argue that, those are factors.

4 And whether the person receiving the communications had a
5 reason to believe that the speaker had a propensity to engage
6 in violence. So that is the hearer, the receiver of the
7 statement or the communication.

8 So I have defined what true threat means. That ties into
9 Instruction Number 9, so Instruction Number 9 will stand.

10 Are there any objections to Instruction Number 10?

11 MS. FLIAM: No objection.

12 THE COURT: From the defense?

13 MR. REIMAN: Just since you brought it up, I didn't
14 know -- in filing 36, part two of that was the intent to
15 retaliate, and whether we fit that into Instruction 9 or give a
16 separate instruction, I am asking for that in my proposed
17 instruction consistent with the *Fenton* opinion, which he went
18 through great lengths and gave a great explanation to why he
19 got to where he was, Judge Brooks did.

20 "The Government must prove beyond a reasonable doubt that
21 Unocic intended that his threat be communicated to Agent Tubbs.
22 If the Government failed to prove Unocic intended his words be
23 communicated to Agent Tubbs, you must find him not guilty."

24 As the Court concluded, intent to retaliate within the
25 meaning of 115(a)(1)(B) can only exist when the speaker intends

1 that his threat be communicated to its object. It is the
2 conveyance of the threat to the victim and the fear and
3 apprehension such communication carries with it which
4 constitutes the retaliation, which makes sense to me.

5 If that's not what the law is, it seems an odd result that
6 someone can be sitting in jail and say, "I'm going to blow that
7 son of a bitch up so he doesn't testify." You're all good
8 then. But if he says, "I'm going to blow that son of a bitch
9 up to get back for [sic] him for what he did to me," then all
10 of a sudden you're in violation of this law. That just seems a
11 very odd line to draw, and in the end what we are doing -- what
12 the result here is that the government is prosecuting bad
13 thoughts that were voiced out loud. Thank you.

14 THE COURT: Okay. And I understand your argument.
15 It is well taken, and it's from *United States vs. Fenton*, but
16 that is not the law in the Eighth Circuit, and I've stated what
17 the law is when it's with an intent to retaliate against such
18 official on account of his performance of official duties. The
19 threat need not be communicated to the agent. And it's a line
20 that was drawn, and it wasn't drawn by me. It was drawn by
21 Congress, okay, and that's what the law is.

22 All right. So the objection to Instruction Number 10 is
23 overruled. It's noted and overruled.

24 All right. Instruction Number 11. Is there any objection
25 to the definition of the law enforcement officer?

1 MS. FLIAM: No.

2 MR. REIMAN: No, sir.

3 THE COURT: Instruction Number 12: Proof of Intent or
4 Knowledge. Any objection?

5 MS. FLIAM: No.

6 MR. REIMAN: No.

7 THE COURT: Instruction Number 13: Reasonable Doubt.
8 Any objection?

9 MS. FLIAM: No.

10 MR. REIMAN: No, sir.

11 THE COURT: Instruction Number 14: Dates of Offense.
12 Any objection?

13 MS. FLIAM: No.

14 MR. REIMAN: No, sir.

15 THE COURT: Instruction Number 15: Venue. Any
16 objection?

17 MS. FLIAM: No.

18 MR. REIMAN: No, sir.

19 THE COURT: Instruction Number 16: Election of
20 Foreperson and Rules for Deliberation. Any objection?

21 MS. FLIAM: No.

22 MR. REIMAN: No, sir.

23 THE COURT: And I will note at this point -- we'll go
24 to the verdict form in just a moment. I think both counsel
25 know that I will read the instructions -- the first 15

1 instructions to the jury so they will have them. Closing
2 arguments will occur, and then I'll read number instruction --
3 I'll read Instruction Number 16 right before they deliberate
4 so....

5 All right. Now, as to the verdict form, any objection as
6 to the verdict form?

7 MS. FLIAM: No.

8 MR. REIMAN: No, sir.

9 THE COURT: All right. And are there any other --
10 we've already talked about the instructions that were tendered
11 by the defense. Are there any other instructions that are
12 being tendered or offered this morning by the government?

13 MS. FLIAM: There are not.

14 THE COURT: Or by the defense?

15 MR. REIMAN: No, sir. Thank you.

16 THE COURT: Okay. Other than those that have been
17 noted. All right. Very well. Then we will prepare for --
18 well, I'm going to need about ten or -- what do you need?

19 MR. REIMAN: I've got to use the restroom.

20 THE COURT: Let's take about 10 to 15 minutes. We'll
21 plan on -- let's reconvene at five minutes after 10:00 for
22 closing arguments and instructions.

23 All right. Thank you. We are in recess.

24 (Recess taken at 9:50 a.m.)

25 (At 10:08 a.m. on September 27, 2023; with counsel for the

1 parties and the defendant present; WITHOUT the jury:)

2 THE COURT: We're outside of the presence of the
3 jury. It comes time now for final instructions and closing
4 arguments. Counsel have anything to take up before we bring
5 the jury?

6 MS. FLIAM: No, Your Honor.

7 MR. REIMAN: No, sir.

8 THE COURT: All right. Very well. Let's bring the
9 jury.

10 (Jury in at 10:09 a.m.)

11 THE COURT: Welcome back, ladies and gentlemen of the
12 jury. Comes now time for your final jury instructions that
13 I'll be giving to you as well as closing arguments. I've
14 placed the instructions on your chair, as I have before, so you
15 can either read along with me or listen to the instructions.
16 This is United States versus Anthony Unocic, Final Jury
17 Instructions.

18 (The Court read Final Jury Instructions 1 through 15.)

19 THE COURT: Instruction Number 16 I will read to you
20 at the conclusion of the closing arguments.

21 All right. Counsel, are you prepared to proceed to
22 closing arguments?

23 MR. PACKARD: Yes, Your Honor.

24 MR. REIMAN: Yes, sir.

25 THE COURT: All right. Mr. Packard, you may do so

1 for the government, please.

2 (Closing arguments made by counsel.)

3 THE COURT: Ladies and gentlemen, Instruction
4 Number 16.

5 (The Court read Final Jury Instruction 16.)

6 THE COURT: Those are my instructions, dated this
7 27th day of September, 2023, submitted at 11:30 a.m. and signed
8 by me on this date.

9 Ladies and gentlemen, take these instructions as well as
10 the verdict form, and good luck in your deliberations. Thank
11 you.

12 Juror Number 13, I'll see you back in chambers in just a
13 few moments. Thank you.

14 (Jury out at 11:29 a.m.)

15 THE COURT: You may be seated.

16 All right. Counsel, just a couple of things to take up
17 before we break. First of all, congratulations on a well-trying
18 case by both parties. It was tried professionally.

19 Mr. Unocic, you were provided with an excellent defense in
20 this case. The jury will determine what the verdict is given
21 the instructions and given the law.

22 Two things. Number one, when Kathy comes back in, if you
23 would give her your cell phone or -- but both of you are in the
24 building so -- but I think cell phone or a way to get ahold of
25 you just in case there are any questions that the jury may have

1 during the course of deliberations or once there is a verdict.
2 So if you'll talk with Kathy to get her your contact
3 information or cell phones.

4 And secondly, if you would go through the exhibits just
5 briefly to make sure that Kathy has all of the exhibits and
6 that they will make their way back to the jury as quickly as
7 possible.

8 All right. Are there any other questions or any other
9 matters that we need to take up before we break, either from
10 the government --

11 MR. PACKARD: No, Your Honor.

12 THE COURT: -- or from you, Mr. Reiman?

13 MR. REIMAN: No, sir. Thank you.

14 THE COURT: All right. Well done. We will stand in
15 recess until we hear something further from the jury, either a
16 verdict or any questions that the jury may have. We stand in
17 recess.

18 (Recess taken at 11:31 a.m.)

19 (At 11:40 a.m. on September 27, 2023; with only counsel
20 for the parties present; WITHOUT the jury:)

21 COURTROOM DEPUTY: This case is United States of
22 America versus Anthony Unocic, Case Number 4:23CR3019. The
23 following exhibits were offered and received into evidence by
24 the government.

25 Exhibit Numbers 1, 3, 4, 6, 7, 8A, 8B, 9B, 10B, 11, 17A1

1 through 17A30, 17A32 through 17A34.

2 Exhibits 2 and 17A31 were offered but not received as
3 evidence by the government.

4 No exhibits were offered or received into evidence by the
5 defendant.

6 Counsel for the government agree?

7 MR. PACKARD: Yes.

8 COURTROOM DEPUTY: Counsel for defendant agree?

9 MR. REIMAN: Yes.

10 COURTROOM DEPUTY: Okay. Thank you. We're done.

11 (Recess taken at 11:41 a.m.)

12 (At 2:00 p.m. on September 27, 2023; with counsel for the
13 parties and the defendant present; WITHOUT the jury:)

14 THE COURT: We're back on the record. It's 2 p.m. on
15 September 27. We're outside of the presence of the jury. The
16 Court did receive a request that reads as follows:

17 "Dear Judge Gerrard: Is it possible to get the text of
18 the law that states what the definition is of a threat to a
19 federal law enforcement officer? Thank you."

20 The answer to that basically is no, but I'm politely
21 telling them that the law you must apply in this case is
22 contained in the jury instructions that I gave to you -- that
23 is the law -- hyphen, in particular, Instructions Number 9 and
24 10 define what constitutes a threat.

25 Anything the government wishes to add?

1 MR. PACKARD: No, Your Honor.

2 THE COURT: Any objection to that?

3 MR. PACKARD: No, Your Honor.

4 THE COURT: Or from the defense? Turn on your mike
5 if you're -- please.

6 MR. REIMAN: I was thinking of including the
7 elements -- Number 8 as well, the elements instruction.

8 THE COURT: Number 9.

9 Do you have my book, Kathy? I thought 9 was the elements
10 instruction.

11 MR. REIMAN: Nine is the -- I think 9 is the threats,
12 defined.

13 THE COURT: I think 10 is, but let me turn...I'll
14 see. I'll see, I'll see. Nine is the elements instruction.
15 Ten is the threat, defined.

16 MR. REIMAN: Oh. I must have it wrong, then. I'm
17 sorry.

18 THE COURT: Yeah. Number 8 is simply what the
19 indictment says.

20 MR. REIMAN: Okay. That's fine. I must be looking
21 at an old copy. Yeah, I'm good with that, the elements and the
22 description of the charge. Yes. I'm fine.

23 THE COURT: There's a lot of questions they could ask
24 us. This isn't one I'd be expecting, but that's all right
25 so...all right. Very well. I will get this to them right

1 away, and we will let you know when we have anything else come
2 up. Okay. Thank you. We are adjourned now.

3 (Recess taken at 2:02 p.m.)

4 (At 4:55 p.m. on September 27, 2023; with counsel for the
5 parties and the defendant present; WITHOUT the jury:)

6 THE COURT: We're on the record in United States of
7 America versus Anthony Unocic. It's about five minutes till
8 5:00 on September 27. I wanted to let the lawyers know two
9 things. Number one, the jury left for today at 4:45. They
10 have not reached a verdict. Right before that they had a
11 question. And I apologize, I didn't ask for any input, but the
12 question was, "Does unanimous mean a 12-0 vote?" And my answer
13 was yes.

14 Okay. Trusting there's no objection to that answer. From
15 the government?

16 MR. PACKARD: No objection.

17 MR. REIMAN: No.

18 THE COURT: Nor from the defense. So at 8:45 they
19 will be back in the morning so...all right. You'll obviously
20 both -- I've got sentencings and stuff in the afternoon. We'll
21 see what happens in the morning, but you'll both be around the
22 building?

23 MR. REIMAN: Yes, sir.

24 MS. FLIAM: I have a sick kid, Judge, so I'm home in
25 the morning, but I'll be here in the --

1 THE COURT: As long as somebody -- yeah. But as long
2 as there's a representative from the government and defense.

3 So we are in recess and adjourned until tomorrow morning.
4 Thank you.

5 (Evening recess at 4:56 p.m.)

6

7 * * * * *

8

9 I certify that the foregoing is a correct transcript from
10 the record of proceedings in the above-entitled matter.

11

12

13 /s/Lisa G. Grimminger February 6, 2024
14 Lisa G. Grimminger, RDR, CRR, CRC Date

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